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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

INTERNATIONAL SALT COMPANY, INCORPORATED, *Appellant*, *against* UNITED STATES OF AMERICA.	No. 46.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

A

In its preliminary statement the brief for the United States recognizes the fact that "although in form the case arises on motion for summary judgment, in fact the procedure was more in the nature of a motion for judgment on the pleadings". The burden of proof of a violation of the Anti-Trust laws is on the plaintiff. It must prove by a preponderance of the evidence that the effect of the Lixator and Saltomat leases made by the defendant, International Salt, was unreasonably to restrain trade or commerce or substantially to lessen competition.

Under the denials in its answer defendant may prove any fact bearing on the issue whether the restraint of trade or

commerce effected, if any, was reasonable or unreasonable, or whether competition was substantially lessened as a result of said leases. The brief for the United States several times makes the statement that certain facts have not been alleged by the defendant or do not appear in the record (Br. pp. 16, 34, 35, 48). It was not necessary for the defendant to allege evidentiary facts bearing on the issues raised by the allegations of the complaint and the denials in the answer. If any fact provable under the defendant's denials would raise an issue of fact as to the reasonableness or unreasonableness of the restraint of trade, if any, effected by the defendant's leases, or as to whether they effected a substantial lessening of competition, then the defendant is entitled to a trial and an opportunity to submit its evidence.

In only one case, so far as we have been able to find, has a summary judgment in an Anti-Trust suit been upheld by this Court. In that case (*Associated Press* v. *United States*, 326 U. S. 1) one of the appellants contended that summary judgment should have been granted to the plaintiff, thus conceding that summary proceedings were properly utilized in the case, and none of the appellants pointed to any disputed facts creating a triable issue (Opinion, p. 5). This Court, moreover, at page 6 of its opinion stated:

> "* * * We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them. Sartor *v.* Arkansas Natural Gas Corp., 321 U. S. 620."

Also, as appears from the opinion of the District Court (52 Fed. Supp. 362, 364), evidence in the *Associated Press* case had been taken in the form of interrogatories, admis-

sions under Rule 36, examinations before trial and affidavits, and the motion for summary judgment was based upon all of these. We find no case, and we venture to say there is none, in which judgment on the pleadings has been granted in a case of this kind.

Morton Salt Co. v. *G. S. Suppiger Co.*, 314 U. S. 488, stressed by Government counsel, does not present, as they contend, "a factual situation almost identical with the instant case". One very important feature of this case was missing in the *Morton* case, namely, the provision in the Lixator lease protecting the customer in the event of a general reduction in the price of salt, and the provision in the Saltomat lease giving the lessee the benefit of any general reduction in lessor's price of salt tablets. It cannot be disputed that one of the principal objects of the Anti-Trust laws is to prevent the fixing of prices and the elimination of price competition. Under the Lixator lease, at any rate, price competition is specifically preserved. If the price of salt declines, the lessor must meet the lower price or the lessee may buy elsewhere. While this one factor may not in and of itself be sufficient to prevent these leases from violating the statute when all the other facts are known, nevertheless with this provision in the lease it cannot be said that the lease *per se* violates the statute. The other facts bearing on the case must first be heard and the factual issues determined on a trial.

Mercoid Corp. v. *Mid-Continent Investment Corp.*, 320 U. S. 661, and *Mercoid Corp.* v. *Minneapolis-Honeywell*, 320 U. S. 680, are not authority for sustaining the judgment on the pleadings which has been granted in the case at bar. In the *Mercoid* cases, the factual issues had been tried and decided against the respondent by the District Court. The Circuit Court of Appeals reversed and held that, as a

matter of law, the respondent had not attempted illegally to extend the scope of the patent. This Court disagreed and reversed the Circuit Court. No question of summary judgment was involved, and certainly no question of judgment on the pleadings.

United States v. Yellow Cab Co. No. 1035, October Term 1946, cited in the Government brief, involved only the sufficiency of the complaint. Defendant had moved in the District Court to dismiss the complaint, which motion was sustained, and an appeal taken direct to this Court. The question involved in that case was whether the complaint stated facts sufficient to constitute a claim. This Court held that the allegations as to the amount of interstate trade affected were sufficient to sustain the complaint, which is a very different thing from holding that the facts stated showed a violation of the Sherman Act sufficient to sustain summary judgment, or judgment on the pleadings. The complaint, moreover, alleged that the result of the restrictive agreement complained of was that the operating companies must pay more for cabs than they would otherwise pay, and the Court pointed out that the operating companies were injured by the agreement "to the extent that the controlled operating companies are charged higher than the open market price" (Law Ed. Advance Opinion, Vol. 91, pp. 1599, 1600, footnote 5).

The Government alleges (Br. p. 30 *et seq.*) that the public policy which prohibits abuses of the patent privilege through extension of the patent monopoly beyond the confines of the grant and the public policy of the Anti-Trust laws are the same, and that, therefore, the cases, such as *Corbice Corp. of America* v. *American Patents Development Corp.*, 283 U. S. 27, and the *Morton Salt* case, which have upheld in actions for infringement of patent a defense that

the patent owner has abused his patent right by attempting to extend the scope of the patent monopoly are authorities for the Government's contention that such an attempt constitutes a violation of the Anti-Trust laws. It would seem a sufficient answer to this argument that this Court, in the *Morton Salt* case, while upholding the defense of the abuse of the patent, twice stated in its opinion that it did not decide the question whether the Anti-Trust laws had been violated. If the abuse of the patent complained of necessarily constituted a violation of the Anti-Trust laws, these statements of the Court would have been superfluous.

Moreover, in *Transwrap Corp.* v. *Stokes Co.*, 329 U. S. 637, decided this year, this Court twice stated in its opinion (pp. 641, 645) that the Court would not lend its aid to enforce an agreement where the use of unpatented materials is tied to the use of a patent "though control of the unpatented article falls short of a prohibited restraint of trade or monopoly", citing *Morton Salt Co.* v. *Suppiger Co., supra.*

The cases cited by the Government, therefore, in which the Court refused to entertain a claim for infringement because of an alleged abuse of the patent monopoly by the use of a so-called "tying" agreement, do not support the judgment in the case at bar.

Government counsel contends (Br. p. 47) that the proportion of the commerce in rock salt and salt tablets affected by the Lixator and Saltomat leases is immaterial citing *Oxford Varnish Corp.* v. *Ault Wiborg Corp.*, 83 Fed. (2d) 764. In that case, the Circuit Court of Appeals made the statement that it was aware of no pronouncement that proportions are "conclusive" (opinion p. 766). The proportion of the trade in rock salt and salt tablets affected by these leases, however, is a relevant factor in determin-

ing whether the restraint of trade and commerce is unreasonable and whether competition in these products has been substantially lessened, and these facts should be before the District Court before a determination is made as to the legality or illegality of the leases in question.

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 357;
International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 298;
B. S. Pearsall Butter Co. v. *Federal Trade Commission*, 292 Fed. 720, 722.

No appeal was taken in the *Oxford Varnish Co.* case, and so far as we can find it has not been cited in any of the decisions of this Court.

B

The brief for the United States, (Br. p. 45, footnote 14) states, referring to *International Business Máchines Corp.* v. *United States*, 298 U. S. 131, that "In that case, as in this one, there was nothing to prevent the lessee from also leasing machines from other manufacturers and from using other cards in such machines". The facts in the opinion in the *International Business Machines* case do not support that statement. It appears from the opinion (p. 133) that Remington Rand was the only other manufacturer of machines comparable to those of International Business Machines Corp. On page 136 of the opinion the Court speaks of Remington Rand as appellant's "only competitor". Remington Rand was a defendant in the suit, and one of the objects of the action was to declare invalid under the Sherman Act a contract entered into by appellant International Business Machines Corp. with Remington Rand

and two other defendants, by which each agreed to use the type of lease used by International Business Machines Corp. and not to solicit the lessees of the machines of the others to purchase tabulating cards (Opinion, p. 132). The other two defendants had been eliminated from the suit, one by dissolution and the other by merger with International Business Machines Corp. (Opinion, p. 133). The record in that case showed, therefore, that the only other source from which a lessee could lease a comparable machine was Remington Rand, and the tie-in between Remington Rand and International Business Machines Corp. with respect to their dealings with each other's customers made it at least, speculative whether a lessee from International Business Machines Corp. could have leased a machine on satisfactory terms from the sole competitor, Remington Rand.

These facts distinguish the *International Business Machines* case from the *Sinclair* and *Pick* cases[1], and these cases are not in conflict.

The facts in the case at bar, which appellant is entitled to prove under the general denial in its answer, more closely resemble the facts in the *Sinclair* case. The brief for the United States attempts to distinguish the *Sinclair* and *Pick* cases on the ground that in each of them it clearly appeared that similar products could readily be obtained elsewhere. The same fact will appear in the case at bar, if the appellant is permitted to go to trial. There are a number of other machines available for lease from other manufacturers which perform a function similar to that of the Lixator, and which can be leased on comparable terms. Another ground of distinction alleged by govern-

1. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463. *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, affirming 80 Fed. (2d) 641.

ment counsel is that in the *Pick* case the record showed that competition in the sale of replacements parts for automobiles, instead of growing less, had substantially increased through the period during which the provisions complained of had been in force (80 Fed. (2d) at p. 644). The same fact may also appear in this case, and defendant is entitled to submit proof on that point on a trial of the action under its denial of the plaintiff's allegations that competition has been substantially lessened as a result of the defendant's leases.

In the *International Business Machines* case, this Court did not hold that under no circumstances would the lessor of a patented machine be entitled to restrict its lessee to a use of a particular product for the purpose of protecting the lessor's good-will. What the Court held was that the restriction made in the leases of International Business Machines Corp. was not necessary for that purpose (opinion p. 140). The decision in each case should, we submit, be based on the facts of that particular case.

The Lixator machine is in competition not only with other machines which perform the function of producing brine from rock salt, but also with machines which produce brine from evaporated salt. Evaporated salt is pure Sodium Chloride, whereas rock salt, being of lower grades and a cheaper product, contains impurities which in the process of producing brine form a sludge which must be disposed of, if the machine is to operate properly. In distributing its Lixators, appellant advises its lessees as to certain fixed intervals at which the sludge disposal should be operated, these intervals being based on the chemical content and analysis of the rock salt produced by defendant which is consistently high in Sodium Chloride content and contains a lesser amount of insoluble impurities than the rock salt produced by other mining concerns (R. 17, 18).

Because the Lixator is in competition with the machines which produce brine from evaporated salt, and because the idea of producing brine from rock salt rather than the high priced evaporated salt is a comparatively novel one which must be "sold" to brine users hitherto accustomed to the use of evaporated salt, which because of its purity has no sludge disposal problems, it is extremely important that each Lixator machine should operate satisfactorily in the production of brine, and should not only produce brine of uniform quantity and concentration, but should do so with the minimum of complication due to the accumulation of sludge from the rock salt and its removal by means of the Lixator sludge disposal device.

That these Lixator machines should operate to the satisfaction of the brine manufacturers to whom they are leased is also to the public interest. If brine manufacturers can be "sold" on the idea of using rock salt instead of the higher priced evaporated salt for the production of brine, the result will be a reduction in the cost of brine which will be reflected in the lower cost to the public of products in which brine is used.

These are all facts which can be established, and which plaintiff is entitled to establish under its general denial. With these facts established, there will be a decided question whether the Lixator leases, at any rate, with the restrictive provision complained of, have resulted in a substantial lessening of competition, or whether the restraint of trade effected, if any, is unreasonable.

American Optical Co. v. *New Jersey Optical Co.*, 58 Fed. Supp. 601, 605.

C

The Government objects to any change in the provisions of Paragraph VI of the judgment, although it states (Br. p. 54, footnote 19) that if the need arose the Government would not oppose permitting appellant to charge a lower price in order to meet, in good faith, the equally low price of a competitor.

The need has already arisen and will, no doubt, arise many times in future. The suggestion that appellant apply to the District Court whenever such an occasion arises is not a practical one. Certainly a customer offered a machine at a nominal rental by a competitor will not wait for a District Court to determine whether the appellant can meet the price.

The Government's only expressed objection to the substitute for Paragraph VI proposed in appellant's main brief (p. 39) is that an injunction against discrimination, such as appellant proposes, would require an inquiry into the motives of appellant in accepting or refusing applications for machines and would be more difficult for the Trial Court to supervise and police.

The unfairness to the appellant, however, of the present Paragraph VI outweighs this suggested difficulty. It must be considered that appellant has never attempted an attitude of coercion toward the lessees of its machines, that, as appears from the record, it has in many instances sold the Lixator machine outright where the customer has objected to leasing the machine and without any agreement as to the source from which the rock salt for use in the Lixator was to be purchased (R. 16). It has, in some instances, refused to sell a Lixator or a Saltomat machine (R. 16), but it has never refused to install such a machine

because the customer objected to signing a lease on the standard form (R. 17). In many instances, moreover, lessees of Lixator or Saltomat machines have purchased rock salt or salt tablets for use in the leased machines from sources other than the defendant International Salt, to the knowledge of said defendant, and in no instance has International Salt removed or attempted to remove or threatened to remove the machine from the possession of the lessee (R. 17). The Government's brief suggests that this was because appellant knew that the contract was not enforceable, but this suggestion would not explain why there has never been any threat of removal.

In other words, so far as this record shows, there is no disposition on the part of this appellant to coerce a lessee of a Lixator or Saltomat machine into buying rock salt or salt tablets from the appellant if he chooses not to do so. It is a settled principle of equity procedure that an injunction will not be granted against an act which has not even been threatened. By the same token, this appellant should not be penalized because of the possibility of its adopting an attitude of coercion toward lessees or prospective lessees of Lixator or Saltomat machines which would not be in line with its conduct to date as shown by this record.

The fears of Government counsel as to the difficulty of enforcing the alternative injunctive provisions suggested in appellant's main brief are, we believe, entirely unfounded. If International Salt should adopt a policy of coercion towards the lessees of its Lixator or Saltomat machines, as suggested by Government counsel, there would be no lack of complaints on which to base a contempt motion.

D

The judgment of the Court below should be reversed and the case remanded to the District Court for trial. If the judgment should be affirmed, in any event it should be modified to eliminate Paragraph VI and substitute the clause suggested by appellant.

Respectfully submitted,

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